Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Rudra Sabaratnam, M.D. and	)	
Robert I. Bourseau,	)	Date: September 25, 2007
	)	
Petitioners,	)	
	)	
- v. -	)	Docket Nos: C-05-520
	)	C-05-521
The Inspector General.	)	Decision No. CR1660
	)	

DECISION

In these proceedings, based on section 1128(b)(7) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(b)(7), I sustain the determination of the Inspector General (I.G.) to exclude Petitioners Rudra Sabaratnam, M.D. and Robert I. Bourseau from participating in Medicare, Medicaid, and all federal health care programs. I sustain as reasonable the I.G.'s determination to set the period of Petitioner Bourseau's exclusion at 15 years. Because I find and conclude that the 15-year period of exclusion the I.G. proposes for Petitioner Sabaratnam is not reasonable, I here reduce that period of exclusion to 10 years.

I. Procedural History

This case is before me pursuant to Petitioner Sabaratnam's Request for Hearing dated August 13, 2005 (docketed as C-05-520) and Petitioner Bourseau's Request for Hearing dated August 13, 2005 (docketed as C-05-521). By their Requests for Hearing, Petitioners seek relief from the I.G.'s determination to exclude each of them from participation in Medicare, Medicaid, and all other Federal health care programs for a period of 15 years. The I.G.'s determination invokes the authority set out in section

1128(b)(7) of the Act, 42 U.S.C. § 1320a-7(b)(7), and 42 C.F.R. § 1001.901, and is based on Petitioners' alleged conduct contrary to the terms of sections 1128A(a)(1)(A) and (B) of the Act, 42 U.S.C. §§ 1320a-7a(a)(1)(A) and (B). *See* I.G. June 14, 2005 exclusion notices.

In May 2003, a civil action arising from the same conduct that forms the basis of the exclusion actions now before me was commenced in the United States District Court for the Southern District of California, designated as No. 03-cv-907-BEN (WMC). The United States Department of Justice (DOJ) elected to pursue that suit on behalf of the United States against Bourseau and Sabaratnam, and in it relied principally on the False Claims Act (FCA), 32 U.S.C. § 3729 *et seq*. Most of the factual assertions relied on by the United States in that case are in all material respects identical to the factual assertions relied on by the I.G. in this case. The I.G. was aware of the pending FCA lawsuit when he sent notice on June 14, 2005 of his intention to exclude Petitioners.

At the suggestion of the parties in this case, I decided to wait in proceeding with this exclusion matter pending the results of a conference undertaken by the parties in the FCA litigation to discuss settling their civil action. However, as the parties were not able to reach agreement, the FCA lawsuit did not settle, and thus I scheduled a prehearing conference in this matter. That conference was held with the parties in this case on January 13, 2006, and an order establishing filing procedures was issued on January 19, 2006. On February 22, 2006, Petitioners filed a notice informing me of their substitution of attorney of record. Subsequently, by ruling issued April 4, 2006, the two hearing requests were consolidated under Docket No. C-05-520. The parties completed their prehearing exchanges,[1] and October 30, 2006 was established as the hearing date in this case by Notice of July 17, 2006. Hearing subpoenas were issued on September 18, 2006.

On September 29, 2006, Findings of Fact and Conclusions of Law (Findings and Conclusions) were filed by the United States District Judge in the parallel FCA civil case, No. 03-cv-907-BEN (WMC). Those Findings and Conclusions were reached by the District Judge after a six-day bench trial held in July, 2006.[2] Pursuant to Federal Rule of

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[1] The I.G. filed proposed exhibits (I.G. Exs.) 1-229.

[2] United States District Judge Roger T. Benítez, United States District Court for the Southern District of California, issued a decision finding that Petitioners Bourseau and Sabaratnam had violated the civil False Claims Act by causing Bayview to submit false or fraudulent costs to Medicare for payment in Bayview's Medicare cost reports for 1997-1999. A judgment was entered against Petitioners in the amount of $23,776,332 for treble damages and $31,000 in civil penalties. The Court found that damages to the

Civil Procedure 59(e), both sides in No. 03-cv-907-BEN (WMC) filed motions to alter or amend the United States District Court's Findings and Conclusions. On October 17, 2006, proceedings in this matter were stayed pending the United States District Court's ruling on the parties' Rule 59(e) motions, and, for obvious reasons, the hearing in this case scheduled to begin on October 30, 2006 was vacated. On December 1, 2006, by agreement of the parties to the FCA action, the United States District Judge reduced the damages and judgment against Bourseau and Sabaratnam by approximately one-third.[3]

With the conclusion of the litigation in the United States District Court, I determined that this case should no longer remain stayed. Subsequently, after discussions with the parties, by Order issued February 6, 2007 I directed the parties to file their cross motions for summary judgment and briefs in support of their motions. Petitioners filed their motions and brief on April 19, 2007, accompanied by two documents which I have designated as P. Ex. 7 and P. Ex. 8. The I.G. filed his motion and brief on April 20, 2007. With his motion the I.G. filed a 1,258-page hearing transcript of the six-day bench trial in the FCA civil case. It has been marked Administrative Law Judge (ALJ) Ex. 1 and is admitted to the evidentiary record of this case with that designation. The parties then filed answer briefs: Petitioners' were filed on May 21, 2007, and the I.G's on May 22, 2007. Attached to his Motion for Summary Judgment, the I.G. submitted three additional exhibits, I.G. Exs. 230-232.

Medicare program were $7,925,444; that Petitioners had engaged in a pattern of conduct; and that they acted with a high degree of culpability by engaging in a conspiracy to defraud the Medicare program. *United States v. Bourseau*, *et al.* No. 03-cv-907-BEN (WMC), 2006 WL 2961105 (S.D. Cal. Sept. 29, 2006).

[3] Damages were reduced from $7,925,444 to $5,219,195, and the total judgment from $23,776,332 to $15,657,585. The $31,000 in civil penalties remained the same. *See* Order Granting Plaintiff's and Defendants' Rule 59(e) Motions to Alter or Amend the Judgment, No. 03-cv-907-BEN, 2006 WL 3949169 (S.D. Cal. Dec. 1, 2006).

The result in the FCA litigation has been appealed to the United States Court of Appeals for the Ninth Circuit, where it is pending as Nos. 06-56741 and 06-56743. With his May 22, 2007 reply brief, the I.G. submitted the United States' brief to the Ninth Circuit in that pending appeal.[4] Petitioners subsequently submitted copies of their briefs to the Ninth Circuit in that appeal.[5]

Oral argument was held in this matter on August 9, 2007,[6] and the record in this matter was closed for purposes of 42 C.F.R. § 1005.20(c) on that date by Order of August 14, 2007.

I admit the following exhibits into evidence: I.G. Exs; 1-232; P. Exs. 1-8; and ALJ Exs. 1-3. The United States District Court's September 29, 2006 Findings of Fact and Conclusions of Law and Judgment appear in this record as ALJ Ex. 2, and its December 1, 2006 Order amending the Findings of Fact and Conclusions of Law and Judgment appears as ALJ Ex. 3.

II. Issues

The issues before me are limited to those noted at 42 C.F.R. § 1001.2007(a)(1). In the specific context of this record, they are:

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[4] *See* DOJ's Brief for the Appellee in Response to the Opening Brief of Defendants/Appellants Robert I. Bourseau and RIB Medical Management Services, Inc., and of Defendants/Appellants Rudra Sabaratnam and Navatkuda, Inc. *United States v. Rober I. Bourseau, et al,* No. 06-56741 (9th Cir. 2006), and *United States v. Rudra Sabaratnam, et al.*, No. 06-56743, (9th Cir. 2006).

[5] *See* Opening Brief of Defendants/Appellants Rudra Sabartnam, M.D. and Navatkuda, Inc; and Reply Brief of Defendants/Appellants Rudra Sabartnam, M.D. and Navatkuda, Inc.; *see also*, Opening Brief of Defendants/Appellants Robert I Bourseau and RIB Medical Management Services, Inc.; Reply Brief of Defendants/Appellants Robert I. Bourseau and RIB Medical Management Services, Inc. *United States v. Robert I. Bourseau, et al.,* No. 06-56741 (9th Cir. 2006), and *United States v. Rudra Sabaratnam, et al.*, No. 06-56743, (9th Cir. 2006).

[6] A transcript of the oral argument was provided by the court reporting service from whom the parties had opportunity to order a copy.

1. Whether the I.G. has a basis for excluding Petitioners from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(b)(7) of the Act; and

2. Whether the length of the exclusion proposed as to each Petitioner is unreasonable.

With the sole exception of the reasonableness of the period of exclusion proposed in the case of Petitioner Sabaratnam, I resolve these issues in favor of the I.G.'s position, as I shall explain in detail in the following discussion.

III. Controlling Statutes and Regulations

Section 1128A of the Act, 42 U.S.C. § 1320a-7a, authorizes the Secretary of Health and Human Services (Secretary) to exclude any person who knowingly presents or causes to be presented, to an officer, employee or agent of the United States, or of any State agency, a claim for items or services under Medicaid and Medicare which that person knows or should know was not provided as claimed, including any person who engages in a pattern or practice of presenting or causing to be presented a claim for an item or service that is based on a code that the person knows or should know will result in a greater payment to the person than the code the person who knows or should know is applicable to the item or service actually provided. Section 1128A of the Act establishes penalties for, among other things, the filing of false and fraudulent claims in connection with items or services provided under the Medicare and Medicaid programs.

The Medicare and Medicaid Patient and Program Protection Act of 1987 (MMPPA), Pub. L. No. 100-93, added section 1128(b)(7) to the Act. The legislative history of this section explains that Congress intended to provide the Secretary with authority to exclude a provider or entity that committed an act described in section 1128A of the Act, and that the Secretary could exercise this authority to exclude without imposing any civil monetary or criminal penalties. S. Rep. No. 109, 100th Cong., 1st Sess. at 9-10 (1987). The I.G. is under no obligation to proceed under the permissive exclusion provisions of section 1128(b)(7) of the Act against a person who might have committed fraud. However, once such a person has been convicted of a program-related offense, exclusion is mandatory under section 1128(a).[7]

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[7] I emphasize, for purposes of clarity, that in the case before me the I.G. is seeking to exclude Petitioners under its permissive exclusion authority based on section 1128(b)(7) and not the mandatory exclusion provisions of section 1128(a).

The terms of 42 C.F.R. § 1001.2007(d) provide that in exclusion appeals in this forum:

> When the exclusion is based on the existence of a criminal conviction or a civil judgment imposing liability by Federal, State or local court, a determination by another Government agency, or any other prior determination where the facts were adjudicated and a final decision was made, the basis for the underlying conviction, civil judgment or determination is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal.

There are statutory and regulatory standards that guide the determination of the length of any period of exclusion imposed pursuant to section 1128(b)(7) of the Act. The terms of section 1128A(d) of the Act, 42 U.S.C. § 1320a07a(d), require that the Secretary (and his delegate, the I.G.) "shall take into account – "

> (1) the nature of claims and the circumstances under which they were presented,
>
> (2) the degree of culpability, history of prior offenses, and financial condition of the person presenting the claims, and
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> (3) such other matters as justice may require.

This somewhat general, but nevertheless mandatory, statutory language is restated with more precision in the implementing regulations at 42 C.F.R. § 1001.901 which provide:

> (a) *Circumstance for exclusion.* The OIG [Office of the Inspector General] may exclude any individual or entity that it determines has committed an act described in section 1128A of the Act. The imposition of a civil money penalty or assessment is not a prerequisite for an exclusion under this section.
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> (b) *Length of exclusion.* In determining the length of an exclusion imposed in accordance with this section, the OIG will consider the following factors–

> (1) The nature and circumstances surrounding the actions that are the basis for liability, including the period of time over which the acts occurred, the number of acts, whether there is evidence of a pattern and the amount claimed;
>
> (2) The degree of culpability;
>
> (3) Whether the individual or entity has a documented history of criminal, civil or administrative wrongdoing (The lack of any prior record is to be considered neutral);
>
> (4) The individual or entity has been the subject of any other adverse action by any Federal, State or local government agency or board, if the adverse action is based on the same set of circumstances that serves as the basis for the imposition of the exclusion; or
>
> (5) Other matters as justice may require.

The regulation at 42 C.F.R. § 1001.901, does not provide for the consideration of specified conditions or acts of Petitioner as mitigating factors in determining the length of the exclusion, unlike the regulations for other circumstances leading to exclusion, which do so provide. *Compare* 42 C.F.R. § 1001.901(b) and 42 C.F.R. § 1001.701(d). The legislative history of the final rule relating to the applicable regulations explains that, generally, aggravating and mitigating factors are applied to situations where there is either a benchmark period of exclusion or some other specific period of time that would otherwise set the exclusion period. 57 Fed. Reg. 3298, 3307 (1992). The legislative history further explains that no such benchmark period was set forth in the regulation for section 1001.901, so that "it is appropriate to look only at factors that would help determine an appropriate period of exclusion given the particular facts of each case." Moreover, exclusions pursuant to section 1001.901 are considered *non-derivative exclusions*, meaning the proposed exclusion is based on determinations of misconduct that originate with the I.G. and require the I.G., if challenged, to make a *prima facie* showing that the improper behavior did occur. 57 Fed. Reg. 3298, 3299 (1992); 55 Fed. Reg. 12,205, 12,206 (1990).

For a non-derivative exclusion under section 1001.901, as distinguished from other types of exclusion actions, the I.G. issues a notice of his proposal to exclude, but the exclusion is not effective until the ALJ hears the matter and issues a decision affirming the I.G.'s

determination to exclude. The sole legal mechanism by which an exclusion can be made effective before the ALJ issues a decision requires the I.G. to reach an explicit determination "that the health or safety of individuals receiving services under Medicare or any of the State health care programs warrants the exclusion taking place prior to the completion of an ALJ proceeding . . . ." 42 C.F.R. § 1001.2003(b)(2) and (c). The I.G. made no such determination here.

IV. Findings of Fact and Conclusions of Law

Having considered the entire record, the arguments and submissions of the parties, and being advised fully herein, I find and conclude as follows:

A. General Findings and Conclusions.

1. I reaffirm each and every ruling regarding the admission of transcribed testimony,[8] exhibits, and documents entered into the record, and all rulings on substantive and procedural matters made or announced during the entire course of these proceedings.

2. For purposes of these proceedings, I have taken official notice of the statutes and regulations of the United States and the State of California; the regulations of the Secretary; and the regulations of the California Medicare program known as MediCal as they existed at the time of the cause of action in this matter.

3. The Act authorizes the Secretary to delegate authority granted under section 1128A of the Act to the I.G. to initiate exclusion actions. Act, §§ 1128A(j)(1) and (2), 42 U.S.C. §§ 1320a-7a(j)(1) and (2); *see also* 59 Fed. Reg. 52,967 (1994).

4. The Act defines "agency of the United States" to include any contractor acting as a fiscal intermediary, carrier, or fiscal agency for a Federal health care program. Act, § 1128A(i)(4).

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[8] This specifically includes, but of course is not limited to, transcripts from the civil FCA trial in *United States v. Bourseau*, *et al.*, No. 03-CV-907-BEN (WMC), 2006 WL 2961105 (S.D. Cal. Sept. 29, 2006), and the August 9, 2007 Oral Argument in this case.

5. The Act and implementing regulation define "claim" to mean an application for payments for items and services under a Federal health care program. For claims based on costs, the Act defines "item or service" to include any entry in the cost report, books of account or other documents supporting such claim. Act, § 1128A(i)(2)and (3), 42 U.S.C. §§ 1320a-7a(i)(2) and (3); 42 C.F.R. § 1003.101.

6. The Act and implementing regulations contain slightly different language with identical meaning. Under section 1128A(a)(1) of the Act, the so-called Civil Monetary Penalty Law (CMPL), liability for sanctions attach when a person "knowingly presents or causes to be presented" a claim that the person "knows or should know" is false. Under section 42 C.F.R. § 1003.102(a)(1)-(4), liability attaches when a person "has knowingly presented or caused to be presented" a claim that the person "knows or should have known" to be false.

7. The liability standard encompassed by the FCA, the CMPL, and the regulations are in all material respects identical, and encompass actual knowledge, deliberate ignorance, or reckless disregard. *Wesley J. Hammer, et al.*, DAB No. 1693, n.2 (1999).

8. The actions that form the basis of the I.G.'s exclusion against both Petitioners in this case were presented or caused to be presented after Congress' 1987 enactment of the Omnibus Budget Reconciliation Act (OBRA); therefore, the standard of knowledge of the truthfulness or falsity of all claims at issue in this case is "knows or should know" and "knew or should have known." Pub. L. 100-203, section 4118(e) (1987); *Thomas M. Horras and Christine Richards*, DAB CR1300 (2005), *aff'd* DAB No. 2015 (2006); *aff'd Thomas M. Horras and Christine Richards v. Leavitt*, Nos. 06-2115 and 06-2124 (8th Cir. Aug. 7, 2007).

9. In proceedings brought pursuant to section 1128A of the Act and 42 C.F.R. § 1001.901, a petitioner bears the burden of going forward and the burden of persuasion with respect to any affirmative defenses and any mitigating factors; and the I.G. bears the burden of going forward and the burden of persuasion with respect to all other issues. 42 C.F.R. §§ 1005.15(b)(1) and (2).

10. In these proceedings brought pursuant to section 1128A of the Act and 42 C.F.R. § 1001.901, the I.G. has the burden of proving, by a preponderance of the evidence, that each petitioner knowingly presented or caused to be presented, to an agency of the United States, claims for items or services which the petitioner knew or should have known were not provided as claimed or were false or fraudulent. 42 C.F.R. § 1005.15(b)(2) and (d).

11. For the proposed specific exclusions to be sustained in this case, the I.G. must prove by a preponderance of the evidence that: (1) each Petitioner (a "person"), (2) "presented or caused to be presented," (3) the Medicare and Medicaid "claims" in issue, (4) to the Medicare and/or Medicaid program ("agency"), (5) for medical "items or services" when, in fact, (6) these items and services were "not provided as claimed" or were false and fraudulent, and (7) the Petitioner "knew or should have known" that the claims were not provided as claimed or were false or fraudulent. *Thomas M. Horras and Christine Richards*, DAB CR1300, *aff'd* DAB No. 2015; *aff'd Thomas M. Horras and Christine Richards v. Leavitt*, Nos. 06-2115 and 06-2124.

12. On September 29, 2006, the United States District Court for the Southern District of California entered findings of fact and conclusions of law in *United States v. Bourseau, et al.*, No. 03-cv-907-BEN (WMC). In that FCA litigation, the legal and factual issues before me now are identical to those alleged and proven in the United States District Court; those issues were litigated in the United States District Court action by the parties against whom preclusion is asserted here, Petitioners Sabaratnam and Bourseau; the FCA issues have been determined or resolved by a valid and final judgment in the United States District Court; and the determination of the FCA issues in the FCA litigation was a critical and necessary part of the judgment in the FCA action. Because the United States District Court reached its final, full determination of identical issues after they had been fully litigated, and because its resolution of all those issues was essential to the United States District Court's valid final judgment, its resolution of those issues precludes Petitioners from relitigating those issues here. *United States v. Bourseau*, *et al.*, 2006 WL 2961105.

13. I adopt as my own each of the separate findings of fact and conclusions of law recited by the United States District Court in *United States v. Bourseau, et al.*, No. 03-cv-907-BEN (WMC), insofar as each may be relevant and material to the issues before me in this case. 42 C.F.R. § 1001.2007(d). I have adopted, and I shall, for purposes of clarity, repeat some of those findings and conclusions below as they apply specifically to each Petitioner, but I emphasize that to whatever extent each separate finding of fact and conclusion of law announced by the United States District Court in *United States v. Bourseau, et al.*, No. 03-cv-907-BEN (WMC) is relevant and material to the issues before me, it is adopted and announced here in this paragraph.

B. Findings and Conclusions Applicable to Petitioner Sabaratnam.

1. On June 14, 2005, the I.G. notified Petitioner Sabaratnam that he was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of 15 years, based on the authority set out in section 1128(b)(7) of the Act.

2. Petitioner Sabaratnam perfected his appeal from the I.G.'s action by filing a hearing request on August 13, 2005. His appeal was docketed as C-05-520.

3. By my Order of April 4, 2006, the appeals of Petitioner Sabaratnam, C-05-520, and Petitioner Bourseau, C-05-521, were consolidated as C-05-520.

4. On the basis of each of the separate findings of fact and conclusions of law recited by the United States District Court in *United States v. Bourseau, et al.*, No. 03-cv-907-BEN (WMC), as amended by its Order of December 1, 2006, and as adopted by me for purposes of these proceedings as set out in Finding 13 above, I find and conclude that there is a basis for the I.G.'s proposed exclusion of Petitioner Sabaratnam from participation in Medicare, Medicaid, and all other federal health care programs, pursuant to section 1128(b)(7) of the Act.

5. I have reviewed the length of the proposed period of exclusion of Petitioner Sabaratnam in terms of the factors set out in section 1128A(d) of the Act, 42 U.S.C. § 1320a-7a(d), and the applicable regulations at 42 C.F.R. § 1001.901. On the basis of each of the separate findings of fact and conclusions of law recited by the United States District Court in *United States v. Bourseau, et al.*, No. 03-cv-907-BEN (WMC), as amended by its Order of December 1, 2006, and as adopted by me for purposes of these proceedings as set out in Finding 13 above, I find and conclude that the proposed period of 15 years is not reasonable. I find and conclude that a period of exclusion of 10 years is reasonable.

C. Findings and Conclusions Applicable to Petitioner Bourseau.

1. On June 14, 2005, the I.G. notified Petitioner Bourseau that he was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of 15 years, based on the authority set out in section 1128(b)(7) of the Act.

2. Petitioner Bourseau perfected his appeal from the I.G.'s action by filing a hearing request on August 13, 2005. His appeal was docketed as C-05-521.

3. By my Order of April 4, 2006, the appeals of Petitioner Sabaratnam, C-05-520, and Petitioner Bourseau, C-05-521, were consolidated as C-05-520.

4. On the basis of each of the separate findings of fact and conclusions of law recited by the United States District Court in *United States v. Bourseau, et al.*, No. 03-cv-907-BEN (WMC), as amended by its Order of December 1, 2006, and as adopted by me for purposes of these proceedings as set out in Finding 13 above, I find and conclude that

there is a basis for the I.G.'s proposed exclusion of Petitioner Bourseau from participation in Medicare, Medicaid, and all other federal health care programs, pursuant to section 1128(b)(7) of the Act.

5. I have reviewed the length of the proposed period of exclusion of Petitioner Bourseau in terms of the factors set out in section 1128A(d) of the Act, 42 U.S.C. § 1320a-7a(d), and the applicable regulations at 42 C.F.R. § 1001.901. On the basis of each of the separate findings of fact and conclusions of law recited by the United States District Court in *United States v. Bourseau, et al.*, No. 03-cv-907-BEN (WMC), as amended by its Order of December 1, 2006, and as adopted by me for purposes of these proceedings as set out in Finding 13 above, I find and conclude that the proposed period of 15 years is reasonable.

V. Discussion

A. There is a basis for the I.G.'s exclusion of Petitioners.

The facts in the record before me leave no room for doubt or further debate, and little need for extended discussion – there is a legal and factual basis for the I.G.'s exclusion of each Petitioner. Two distinct approaches to that record require that result: one approach invokes a doctrine well-understood in this forum and in courts generally; and the other relies on regulatory language that I believe was intended by the Secretary specifically to govern cases of this nature. Both approaches ultimately depend upon the United States District Court's determinations in the FCA action: the United States District Court's September 29, 2006 Findings of Fact and Conclusions of Law and Judgment appear in this record as ALJ Ex. 2, and its December 1, 2006 Order amending the Findings of Fact and Conclusions of Law and Judgment appears as ALJ Ex. 3.[9]

[9] Because a federal court adjudicated the FCA case, then federal law controls the collateral estoppel analysis. *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004); *Trevino v. Gates*, 99 F.3d 911, 923 (9th Cir. 1996). That is simply to say that the federal court's view of what the federal FCA means is perfectly binding in this federal administrative law forum.

1. The doctrine of issue preclusion or collateral estoppel bars either Petitioner from challenging the basis for the exclusion.

I must first consider the broad question of whether a form of collateral estoppel or issue preclusion applies to this case. Recent usage favors the term "issue preclusion" over the more traditional term "collateral estoppel." *See Baker, et al. v. General Motors Corp.*, 522 U.S. 22, 233 (1998); *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 77 (1984). The term "issue preclusion" is the term favored in this forum, as I shall explain in more detail presently. But by either term, this fundamental question is raised: does the comprehensive treatment of the material facts in this case by the United States District Court in the context of the FCA litigation, and the District Court's comprehensive resolution of all the material factual disputes in that case, establish conclusively the basis for the imposition of the exclusion sanction in this case? For the reasons that follow, I conclude that it does.

In general, the doctrine of collateral estoppel or issue preclusion provides that once an issue of law or fact is actually and necessarily decided by a court, that determination is conclusive in subsequent lawsuits based on a different cause of action involving a party to the prior lawsuit. *See Montana v. United States*, 440 U.S. 147, 154 (1979). If the doctrine of collateral estoppel or issue preclusion applies, then it has powerful implications for this litigation. Summary judgment is appropriate if – and when – the doctrine of issue preclusion or collateral estoppel resolves all triable issues of fact raised by the pleadings and supporting documents, because it leaves for resolution no disputed issues of material fact. If – and when – the undisputed facts are clear and not subject to conflicting interpretation, then one party is entitled to judgment as a matter of law. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992). Summary disposition is explicitly authorized by the terms of 42 C.F.R. § 1005.4(b)(12), and this forum looks to Federal Rule of Civil Procedure 56 for guidance in applying that regulation. *Robert C. Greenwood*, DAB No. 1423 (1993); *Thelma Walley*, DAB No. 1367; *John W. Foderick, M.D.*, DAB No. 1125 (1990). When the undisputed material facts of a case support summary disposition, there is no right to a full evidentiary hearing. *Surabhan Ratanasen, M.D.*, DAB No. 1138 (1990); *John W. Foderick, M.D.*, DAB No. 1125.

The doctrine of issue preclusion has a long history in the jurisprudence of this forum. The Departmental Appeals Board (Board) has recognized that the doctrine is applicable to its adjudicatory process, and has applied it where the underlying disposition so warranted. *Edward J. Petrus, Jr., M.D.*, DAB No. 1264 (1991). The Board has summarily affirmed an ALJ decision in which the doctrine's operation was at the heart of that ALJ decision and formed the necessary and sufficient basis for the ALJ's award of summary judgment.

Stephen H. Winters, DAB No. 1986 (2005). In other cases, the Board has acknowledged that the doctrine might be applied if the underlying disposition in state or federal court warranted doing so, but declined to apply the doctrine when the underlying disposition did not support its application. *Southern Indian Health Council*, DAB No. 1687 (1999); *Louisiana Department of Health and Hospitals*, DAB No. 1176 (1990); *Virgin Islands Department of Human Services*, DAB No. 980 (1988); *New York State Department of Social Services*, DAB No. 828 (1987). When the Board has been obliged to assess the applicability of the underlying court disposition, it has done so using the four-part test set out in *Haize v. Hanover Insurance Co.*, 536 F.2d 576 (3d Cir. 1976). The elements of that test are: first, the issue or issues sought to be precluded must be the same as the issue or issues addressed in the prior litigation; second, the issue or issues must have been actually litigated, and not simply conceded or stipulated; third, the issue or issues must have been determined or resolved by a valid and final judgment; and fourth, the determination or resolution of the issue or issues must have been essential to the judgment.

The ALJs of this forum have relied on or considered the doctrine when reviewing the I.G.'s exercise of the exclusion sanction. *Berney R. Kezler, M.D., et al.*, DAB CR107 (1990); *Thuong Vo, M.D. and Nga Thieu Du*, DAB CR38 (1989); *Neville Anthony, M.D.*, DAB CR15, n.4 (1988).

The most insightful exploration in this forum of the doctrine of issue preclusion, however, is found in a crucial prehearing ruling by ALJ Alfonso J. Montaño in *Stephen H. Winters*, DAB CR1246 (2004). The case was a section 1128(b)(7) non-derivative exclusion proceeding, and both sides had moved for summary judgment on certain issues. One issue was whether the I.G. was entitled to summary judgment and a ruling that there was a basis for petitioner Winters' exclusion. The I.G. argued that a federal-court verdict and judgment in an FCA lawsuit against Winters, in which the verdict and judgment established that he had knowingly presented a claim for Medicare reimbursement that he knew or should have known was false or fraudulent, precluded Winters from relitigating that point in the non-derivative exclusion case.

ALJ Montaño ruled in the I.G.'s favor on that point and, on April 7, 2003, set out his rationale in a closely-reasoned and articulate discussion that made up part of his "Amended Order Denying Petitioner's Motion for Summary Judgment and Granting the Inspector General's Motion for Summary Judgment as to Her Authority to Exclude Petitioner, and a Notice of a Prehearing Telephone Conference." The complete text of

ALJ Montaño's Amended Order of April 7, 2003 [hereinafter the *Winters Order*] was made available to the parties in this action by my Order of October 26, 2006; since the *Winters Order* may not be readily available, I have attached a copy of it to this Decision as Appendix A.

The ALJ's discussion in the *Winters Order* began by comparing the issues sought to be precluded in the CMPL action before him, brought under section 1128A(a)(1)(B) of the Act, and the issues litigated in the federal-court FCA action brought under 42 U.S.C. § 3729(a)(7). He identified those issues as (1) whether the items submitted on the cost report were false or fraudulent, and (2) whether the entity that submitted them knew or should have known that the items were false or fraudulent. Those two issues are the ones presented to me in this action as part of the broader issue of whether there is a basis for the exclusion of Petitioners Bourseau and Sabaratnam, and they were the exact issues presented to the United States District Court and resolved as shown in ALJ Exs. 2 and 3. The ALJ's discussion examined the language in the two statutes with reference to its precise standard for liability and found them the same: "Therefore, both statutes require falsity and knowledge. . . . Additionally, both statutes define knowledge the same way." *Winters Order*, at 17. I have made the same comparison and have reached the same conclusion in the matter before me. Thus, just as ALJ Montaño found that the first part of the *Haize* test had been satisfied in the matter before him, so do I find that it has been satisfied in this case.

ALJ Montaño next enquired whether the issues of falsity and knowledge had actually been litigated in the FCA action. The method by which he conducted his enquiry was a review of the "transcript of the FCA proceeding" and the "documents from the FCA proceeding." *Winters Order*, at 18. I have reviewed the corresponding material in this case: the trial transcript from the instant FCA action is before me as ALJ. Ex. 1, and the parties here have submitted copies of most of the pleadings and exhibits from that proceeding. *See* ALJ Exs. 2-3, I.G. Exs. 230-232. I have, additionally, the benefit of the parties' appellate briefing in the United States Court of Appeals for the Ninth Circuit. ALJ Montaño's review supported his conclusion that the issues of falsity and knowledge had actually been litigated; my review of the corresponding material and the parties appeallate briefing leads me to the same conclusion: the issues of falsity and knowledge were vigorously litigated in the instant FCA action. And so, in the manner that ALJ Montaño found that the second part of the *Haize* test had been satisfied in the matter before him, so too do I find that it has been satisfied in the case at hand.

The third part of the *Haize* test requires that the issues sought to be precluded must have been determined by a valid judgment. The ALJ in *Winters* had before him a special verdict form read by the jury foreperson, and that verdict form explicitly affirmed that

Winters had knowingly made a false statement; the court later entered its final judgment "in accordance with the jury's verdict." That was enough to satisfy the ALJ, who wrote simply that "the issues of falsity and knowledge were determined by a valid judgment." *Winters Order*, at 18. Here, I have a good deal more: instead of a special form of verdict, I have a highly-detailed set of Findings of Fact and Conclusions of Law in which the issues of falsity and knowledge are reduced to judgment against these Petitioners under the FCA. The amendment of that judgment on December 1, 2006 went only to the amounts of actual damages and trebled damages, and affected nothing else whatsoever. Here I have a record much-expanded beyond what informed ALJ Montaño when he found that the third part of the *Haize* test had been satisfied in the matter before him. So informed, I find that it has been satisfied here.

The fourth part of the *Haize* test requires that the determination or resolution of issues to be precluded here must have been essential to the valid judgment demanded by the third part of the test. This fourth part, like the first part of the test, is best understood as a legal question. The first part of the test asks whether the legal issues are the same; this part of the test asks whether the essential elements required to be proven are the same. The ALJ resolved the question in the *Winters Order* by looking at the instructions given to the jury in the civil trial and concluding that "a determination as to falsity and knowledge was essential to the FCA judgment because both are elements of an offense under 31 U.S.C. § 3729(a)(7)." *Winters Order*, at 19. In the instant FCA case, the United States District Court's Conclusions of Law are congruent, and leave no doubt that its determinations of the knowledge and falsity questions were essential to its judgment. ALJ Ex. 2, at 16-17. The fourth part of the *Haize* test is satisfied in the record before me now.

But there is considerably more in the *Winters Order* than a guide to applying the *Haize* test, and the circumstances of this case make it worthwhile to set out and explicitly adopt here what the ALJ had to say there about the operation of the doctrine of issue preclusion in a non-derivative exclusion proceeding:

> Petitioner argues that allowing the I.G. to rely on the FCA judgment improperly converts what is a non-derivative exclusion into a derivative exclusion. . . . Petitioner is correct that his exclusion pursuant to section 1128(b)(7) is a non-derivative exclusion rather than a derivative exclusion. A derivative exclusion is an exclusion which is "based on an action previously taken by a court, licensing board or other agency." 55 F.R. 12,205, 12,206 (1990). In a derivative exclusion, the basis for the exclusion is the action of the court, board or other agency and the I.G. is not required to "re-establish the factual or legal basis for such underlying sanction". *Id*. Thus, for example, in a section 1128(a)(1) exclusion, the basis for the

> exclusion is the fact of a conviction, not the conduct which resulted in the conviction. Consequently, all that is required of the I.G. under section 1128(a)(1) is that she show that there was a conviction related to the delivery of an item or service under title XVII or any State health care program. In contrast, a section 1128(b)(7) non-derivative exclusion is based on factual determinations initially made by the I.G. that a provider committed an act described in section 1128, 1128A or 1128B. *Id*. at 2,208. Thus, in a non-derivative exclusion proceeding, the I.G. must prove the conduct which is the basis of the exclusion, *e.g.*, the knowing filing of a false claim.
>
> I reject Petitioner's argument because it confuses the question of the basis of an exclusion with the question of the proof needed to establish the elements of an exclusion. In applying the doctrine of issue preclusion, I am not basing Petitioner's exclusion on the FCA judgment. Rather, I am relying on the FCA judgment to preclude Petitioner's relitigating in this forum the question of whether the deferred compensation accrual was knowingly false. The basis of this exclusion is still Petitioner's conduct of knowingly presenting a false claim, not the FCA judgment. The fact that the FCA judgment assists the I.G. in prevailing in this case does not convert Petitioner's exclusion into a derivative exclusion.

Winters Order, at 19-20.

It may be worth repeating: the ALJ employed the *Winters Order* and its application of the doctrine of issue preclusion as the foundation of his decision in *Stephen H. Winters*, DAB CR1246, and that decision was summarily affirmed by the Board in *Stephen H. Winters*, DAB No. 1986. The *Winters Order* has guided my approach to the question of issue preclusion or collateral estoppel, and the result I reach in so doing relies on it.

Having analyzed this record in terms of collateral estoppel or issue preclusion, and having in my analysis considered the four *Haize* factors, I find and conclude these four things. First, the legal and factual issues before me now are identical to those alleged and proven in the FCA litigation in the United States District Court. Next, those issues were actually, and very vigorously, litigated in the United States District Court action by the parties against whom preclusion is asserted here, Petitioners Sabaratnam and Bourseau. Third, the FCA issues were determined or resolved by a valid and final judgment. And fourth, the determination of the FCA issues in the FCA litigation was a critical and necessary part

of the judgment in the FCA action. Because the District Court reached its final, full determination of identical issues after they had been fully litigated, and because its resolution of all those issues was essential to the District Court's valid final judgment, its resolution of those issues precludes Petitioners from relitigating those issues here.

2. A valid and apposite regulation bars either Petitioner from challenging the basis for the exclusion.

Perhaps more importantly, and certainly more specifically, the terms of 42 C.F.R. § 1001.2007(d) provide that in exclusion appeals before the ALJs of this forum:

> When the exclusion is based on the existence of a criminal conviction or a civil judgment imposing liability by Federal, State or local court, a determination by another Government agency, or any other prior determination where the facts were adjudicated and a final decision was made, the basis for the underlying conviction, civil judgment or determination is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal.

Now, it is true that the Board has denied, in *dicta*, the application of this regulation to proceedings based on section 1128(b)(7) of the Act, and it is true that the ALJ in the *Winters Order* expressed agreement with that view. But there are cogent reasons for suggesting that such a view may not still prevail, and it may be worthwhile to set those reasons out here.

When the Board addressed the applicability of 42 C.F.R. § 1001.2007(d) to exclusions based on section 1128(b)(7), it did so gratuitously. The question of the regulation's application was unnecessary to the resolution of the case. What the Board did in *Wesley J. Hammer, et al.*, DAB No. 1693 invalidated an exclusion and reversed the ALJ decision sustaining it because the I.G. had brought the action after the six-year period for doing so had expired. The Board's language referred in passing to "several regulatory provisions that were not intended to apply to non-derivative exclusions, such as 42 C.F.R. § 1001.2007(d) . . . ." But the Board had before it the ALJ's decision in that appeal, and in it appeared these crucial words:

> The regulations are clear that, where the I.G.'s exclusion action is derived from a conviction or determination by another governmental entity, the basis for the underlying determination is not reviewable, and the underlying determination cannot be collaterally attacked on either substantive or procedural grounds. 42 C.F.R. § 1001.2007(d).

Wesley J. Hammer, et al., DAB CR565, at 18 (1999).

There are three critical misapprehensions in that passage. First, the ALJ clearly believed that she was deciding a derivative exclusion, not deciding a non-derivative proceeding. Because of that, she did not explain or elucidate the four-part test from *Haize v. Hanover Insurance.* Had she done so, she would surely have noted that the precise issue involved, that of Hammer's joint and several liability, had not been fully litigated in United States District Court, but rather merely conceded there, leaving the second part of the *Haize* test unfulfilled. Thus the ALJ appeared to have misunderstood the United States District Court's final judgment as the predicate *per se* for a derivative exclusion, rather than as the conduit or vehicle of its findings and conclusions on the issues, implicit and explicit, which it necessarily had to resolve in reaching its judgment.

It may be noted that the Board also wrote its *dictum* in *Hammer* nearly three years before the language of 42 C.F.R. § 1001.2007(d) was revised to take its present form. The authors of the revised regulation were explicitly aware of the Board's decision in *Hammer*. 67 Fed. Reg. 11,928 (2002). The new language made no attempt to limit itself to derivative actions, and the Secretary's gloss on the language proposed to be engrafted on the regulation sedulously avoided any such limitation:

> We propose to clarify in this section that a civil judgment rendered by a Federal, State, or local court is an additional type of prior determination that may be given collateral estoppel effect, and may not be relitigated in the exclusion proceeding

62 Fed. Reg. 11,930 (2002).

The *Winters* litigation in this forum involved Medicare billing and reporting activity completed in the mid-1990s. The *Winters* FCA action was filed in 1997, and the jury verdict against the petitioner in that case was reduced to a judgment entered on September 21, 2001. The ALJ in explaining his view of the unrevised regulation in the *Winters Order*, and the Board in explaining its views of the same unrevised regulation in

Hammer, were simply writing *dicta*. It is important to note that both the ALJ in *Winters* and the Board did not have the benefit of the preamble to the revised version of the regulation. Clearly, the revised version of the regulation removes any expressed impediment to the application of the regulation to proceedings under section 1128(b)(7).

It is on that understanding that I differ most respectfully from the ALJ's view in the *Winters Order* and the Board's in *Hammer*. I do not assert that they were mistaken at the time, or in the circumstances, that their opinions were expressed. But I do suggest that the 2002 revision of the regulation in light of the Board's discussion of it in *Hammer*, the ALJ's misapprehensions of the nature of the exclusion proceedings in *Hammer*, and the fact that *Winters* was decided in the context of the unrevised regulation, invite a critical revisit of the question.

My justification for the revisit has required more discussion than I shall undertake in setting out the results of that revisit. In my view, there is simply nothing in the present text of 42 C.F.R. § 1001.2007(d) to limit it to derivative exclusion proceedings. Indeed, once the precise language employed by the ALJ in the *Winters Order* is recalled, the application of the regulation to non-derivative exclusion proceedings seems not only permitted, but procedurally-salubrious and logically-required:

> In applying the doctrine of issue preclusion, I am not basing Petitioner's exclusion on the FCA judgment. Rather, I am relying on the FCA judgment to preclude Petitioner's litigating in this forum the question of whether the deferred compensation accrual was knowingly false. The basis of this exclusion is still Petitioner's conduct of knowingly presenting a false claim, not the FCA judgment. The fact that the FCA judgment assists the I.G. in prevailing in this case does not convert Petitioner's exclusion into a derivative exclusion.

Winters Order, at 20.

I thus conclude that the terms of 42 C.F.R. § 1001.2007(d) apply to derivative exclusion proceedings brought pursuant to section 1128(b)(7) of the Act. I conclude that the Secretary's explanation of the revisions to that regulation manifests the Secretary's intention that it be so applied. I cannot find a rational path to the contrary conclusion, which would engraft a frustrating, wasteful and illogical exception on the Secretary's otherwise-plain rule, and would invite relitigation – with results potentially embarrassing to the Secretary and this forum – of matters previously adjudicated and settled by a tribunal eminently authorized and competent to do so, and under rules of evidence and procedure every bit as fair and rigorous as those in effect here.

I therefore conclude that the terms of 42 C.F.R. § 1001.2007(d) bar these Petitioners from relitigating any of the findings or conclusions announced by the United States District Court. Those findings and conclusions establish a factual and legal basis for the I.G.'s exclusion of both Petitioners.

B. Sanctions

Once a basis for exclusion is proven by a preponderance of the evidence, as it has been proven against each Petitioner in this case, the ALJ must determine whether the I.G. has set the period of exclusion at a reasonable length. Congress crafted the exclusion sanction as a measure protective of federal healthcare programs and a deterrent to those who would abuse those programs, rather than as a penalty in the form of retribution or punishment to be visited on those proven to have done so. The measure's ultimate goal is the protection of the Medicare and Medicaid programs and their recipients from untrustworthy or unscrupulous participants, and it "serves twin congressional purposes: the protection of federal funds and program beneficiaries from untrustworthy individuals and the deterrence of health care fraud." *Jeremy Robinson*, DAB No. 1905, at 2 (2004); *see also Susan Malady, R.N.*, DAB No. 1816 (2002); *Narendra M. Patel*, DAB No. 1736 (2000); *Joann Fletcher Cash*, DAB No. 1725 (2000). That understanding of the nature of the exclusion sanction informs and guides my analysis in the following pages, as I evaluate the reasonableness of the periods of exclusion that the I.G. has proposed. In doing so, the factors outlined in the regulations generally require that I weigh the gravity of the wrongs done by these Petitioners, and consider what period of exclusion would be necessary to prevent the wrong from being committed again by each Petitioner and, in the future, by others. Taking these notions into consideration, the periods of exclusion I deem reasonable in this case are meant to be proportionate to the improper acts committed by Petitioner Bourseau and Petitioner Sabaratnam, respectively, as reflected in the entire record of this case, and are meant to deter and prevent abuse of the protected programs rather than to punish.

In determining a reasonable period of exclusion for each Petitioner, the CMPL provisions of the Act and 42 C.F.R. § 1001.901(b)(1) require me to examine: (a) the nature and circumstances surrounding the acts that establish the basis for excluding each Petitioner; (b) each Petitioner's culpability for his conduct; (c) each Petitioner's individual criminal, civil, or administrative disciplinary record; (d) evidence of other adverse actions that arise from the same circumstances that establish the basis for excluding these Petitioners; and (e) such other matters as justice may require. If, as I believe, the factors set out at 42 C.F.R. § 1001.901(b) are to be evaluated in a manner similar to the well-understood aggravating and mitigating factors listed at 42 C.F.R. §§ 1001.102(b) and (c), then they may be usefully compared with rules of evidence: they establish *which* factors may be

considered in deciding whether an exclusion is reasonable, but do not impose a rigid formula of *weight* or *persuasiveness* to be afforded any specific item of that evidence. *Jeremy Robinson*, DAB No. 1905, at 4; *Keith Michael Everman, D.C.*, DAB No. 1880, at 7 (2003); and cases cited therein. The weight to be given any particular listed factor when it has been proven is determined by the factual matrix of the record as a whole: the circumstances of each case "drive the weight that a decisionmaker can give the aggravating and mitigating factors." *Jeremy Robinson*, DAB No. 1905, at 4. It is in that factual matrix that I conduct the following analysis.

And I note here that I do so in deference to the views reached by the I.G. in setting the proposed periods of exclusion. The I.G.'s discretion in weighing the importance of aggravating and mitigating factors in, for example, exclusion cases brought under section 1128(a) of the Act and 42 C.F.R. §§ 1001.102(b) and (c), commands great deference when reviewed by ALJs. The source of this doctrine is the belief of the regulations' authors that the I.G. is invested with "vast experience in implementing exclusions . . . ." 57 Fed. Reg. 3298-3321 (Jan. 29, 1992). This rule evolved in such Board decisions as *Barry D. Garfinkel, M.D.,* DAB No. 1572; *Frank A. DeLia, D.O.*, DAB No. 1620 (1997); and *Gerald A. Snider, M.D.*, DAB No. 1637 (1997). With the Board's decisions in *Joann Fletcher Cash*, DAB No. 1725 (2000); *Stacy Ann Battle, D.D.S., et al.*, DAB No. 1843 (2002); *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); and *Jeremy Robinson*, DAB No. 1905; the rule took its present form. The rationale that nurtured the rule in those cases seems to me perfectly applicable in this one.

In the present context, the rule forbids that I substitute my own views of what period of exclusion might appear "best" in each Petitioner's case for the view of the I.G. on the same evidence. In general, the Board has insisted that ALJs may reduce an exclusionary period only when they discover some meaningful evidentiary failing in the aggravating factors upon which the I.G. relied, or when they discover evidence reliably establishing a mitigating factor not considered by the I.G. in setting the enhanced period. *Jeremy Robinson*, DAB No. 1905. But just as significantly, the Board has explicitly sustained an ALJ's reduction of the I.G.'s proposed exclusion when "the ALJ did not accept the I.G.'s view of the evidence" relating to a person otherwise manifestly subject to exclusion, *Thomas M. Horras and Christine Richards*, DAB No. 2015, at 59, and did so implicitly in *Stephen H. Winters*, DAB No. 1986, when it summarily affirmed the ALJ's reduction of an exclusion period from 10 years to four years in *Stephen Winters*, DAB CR1246. *See also Roderick Spencer, D.P.M.*, DAB CR721 (2000).

1. The I.G.'s determination to exclude Petitioner Bourseau for a period of 15 years was not unreasonable under the Act and applicable regulations.

The I.G.'s June 14, 2005 notice of proposal to exclude and his Motion for Summary Judgment explained the specific factors that the I.G. considered in making his determination to exclude Petitioner Bourseau for 15 years. The I.G. assayed the nature and circumstances of Bourseau's acts and found that these acts resulted in Boureau's causing to be submitted cost reports to the Medicare program for Bayview that he knew or should have known included false or fraudulent claims for medical or other items or services. *See* I.G. June 14, 2005 exclusion letters. The false or fraudulent claims were submitted on Bayview's 1998 Cost Report and 1999 Cost Report, altogether totaling $5,219,195 in Medicare funds. *See* Order Granting Plaintiff's and Defendants' Rule 59(e) Motions to Alter or Amend the Judgment, No. 03-cv-907-BEN, 2006 WL 3949169 (S.D. Cal. Dec. 1, 2006).

a. The nature and circumstances surrounding the acts that are the basis for excluding Petitioner Bourseau.

Here, Petitioner Bourseau billed for substantial sums and the period over which he billed for them was lengthy. The expenses billed for were of several types and a pattern was proven. Petitioner Bourseau caused to be presented cost reports by Bayview over a three-year period. Bayview's cost reports for 1998-1999 included several types of false costs associated with a fictitious lease, hospital space rarely used for patients, management fees for work not done, costs for interest never paid, and costs of services to other providers. Petitioner Bourseau also participated in the cost report preparation process for Bayview's fiscal year 1997cost report.

b. Petitioner Bourseau's culpability for his conduct.

One of the most complex of the factors to be considered by an ALJ in determining the amount of the penalty is the "degree of culpability." The guidelines in the regulations indicate that this factor relates to the degree of a petitioner's knowledge and intent. As stated earlier, it is a prerequisite that a respondent "knew or should have known" that the claims were false or improper in order for liability to attach. The determination of the degree of culpability in this case involves an inquiry into the degree of Petitioner Bourseau's knowledge. 48 Fed. Reg. 38,827 (1983).

It has been established that Petitioner Bourseau had actual knowledge that the claims were false and improper. Petitioner Bourseau was fully engaged in a discussion of those claims at a meeting with Paul Fayollat, Bayview's consultant on Medicare issues with over 30 years experience preparing cost reports. Mr. Fayollat advised Petitioner Bourseau that each of the costs at issue was not allowable. In spite of that expert advice, Petitioner Bourseau disregarded his consultant's warnings and directed Mr. Fayollat to include the false costs in the cost reports. In a deposition taken February 10, 2005, Mr. Fayollat stated that "part of the role that he wanted and that I wanted to play in that was to give him my consultation as to the reasons not to do things if that were the case and to make sure that he and everybody understood the implications that you've got to be able to support theses expenses. . . . [b]ut ultimately the determination on major things. Major matters of that report. It was his determination as to what was going to be done." I.G. Ex. 219, at 15 (306).

As to the role Petitioner Bourseau played in preparing and deciding what would be included in the cost reports, Mr. Fayollat stated during his deposition that Petitioner Bourseau "has as good or even more technical knowledge of cost reports than anybody else over the 30 years that I have been doing these." I.G. Ex. 219, at 15 (305). He further testified "[a]nd he was quite a stickler. We would go th[r]ough line by line all of the pieces." *Id*. (306).

This is powerful evidence. It starkly illuminates the attitude and intentions of Petitioner Bourseau, and it demonstrates his very high degree of culpability in the context of full knowledge that what he was doing was unlawful. And as will appear below, it is the principal point of difference between the degree of culpability displayed by the two Petitioners in this case, and in my view of the relative reasonableness of the proposed periods of their exclusion.

c. Petitioner Bourseau's disciplinary record.

The next factor I address is Petitioner Bourseau's prior disciplinary record. Such a record could include any history of criminal, civil or administrative wrong-doing on his part not related to the instant circumstances involving Bayview. The record is silent in this area, and reveals nothing. In light of that, I conclude that there is nothing in Petitioner Bourseau's record which would suggest a higher degree of untrustworthiness than is indicated by the other evidence of record in this case. However, the regulation at 42 C.F.R. § 1001.901(b)(3) states that "the lack of any prior record is to be considered neutral."

d. Evidence as to other adverse actions that arise from the same circumstances that are the basis for excluding Petitioner Bourseau.

Before "other adverse actions" may be weighed against a petitioner, the petitioner must have been "held liable" and subjected to actual sanctions for committing the acts with which he or she is charged in the "other adverse actions." The preamble to the regulation makes clear that prior offenses are not an aggravating circumstance, unless there has been a final agency determination or a final adjudication in a court. 48 Fed. Reg. 38,832 (1983).

The evidence presented here demonstrates that Petitioner Bourseau knowingly presented or caused to be presented unallowable costs in Bayview's 1998 and 1999 cost reports, and has been "held liable" for doing so. Here, the "other adverse action" is the FCA action in United States District Court.

In the FCA action, United States District Judge Benítez entered judgment finding that Petitioners Bourseau and Sabaratnam had violated the FCA by causing Bayview to submit false or fraudulent costs to Medicare for payment in Bayview's Medicare cost reports for 1997-1999. That judgment was entered against Petitioners in the amount of $23,776,332. *United States v. Bourseau*, 2006 WL 3949169 (S.D. Cal. Dec. 1, 2006) *amended* Order Granting Plaintiff's and Defendants' Rule 59(e) Motions to Alter or Amend the Judgment, No. 03-cv-907-BEN, 2006 WL 3949169 (S.D. Cal. Dec. 1, 2006). Judge Benítez found that damages to the Medicare program were $5,219,195, that Petitioners had engaged in a pattern of conduct, and that they acted with a high degree of culpability by engaging in a conspiracy to defraud the Medicare program.

e. Other matters as justice may require.

The CMPL at section 1128A(d)(3) and the regulations at 42 C.F.R. § 1001.901(b)(5) also contain a notably elastic factor, "other matters as justice may require." The CMPL and the regulation do not provide further detail in defining what those "other matters" might be, and the Departmental Appeals Board has characterized the factor as "open-ended" in *Thomas M. Horras and Christine Richards*, DAB No. 2015. Inasmuch as the purpose of an exclusion is deterrence and protection of the Medicare and Medicaid programs rather than retribution or punishment, I must assume that those "other matters" were intended to represent additional factors that would tend to reflect on a petitioner's trustworthiness. *Jeremy Robinson*, DAB No. 1905.

The violations established in this case were deliberate and fraudulent. I am not persuaded by Petitioner Bourseau's arguments to the contrary. The record before me reveals Petitioner Bourseau's conduct to have been calculated to mislead and defraud the protected programs, and to have been crafted to that purpose with a relatively-high level of sophistication. Conduct of that sort is, in the abstract, strongly suggestive of a tendency toward untrustworthiness; when seen against the background of this case and the FCA litigation, it acquires an aura of greed and predation and takes on a stance threatening to the protected programs. Wherever the open end of the "other matters" factor may lie, the protection of the programs from deliberate and very substantial abuse must surely lie well within it. It adds support for the I.G.'s determination to exclude Petitioner Bourseau for 15 years.

The 15-year exclusion is amply justified by the record before me, and by the factors which I have enumerated. Thus, I conclude that the I.G. appropriately considered factors in 42 C.F.R. § 1001.901(b)(1) and (2) in making his determination that the exclusion period necessary for the protection of the program given Petitioner Bourseau's misconduct was 15 years. Moreover, Petitioner Bourseau has not met its burden of persuasion showing me that there are any affirmative defenses to the reasonableness of the length of the exclusion period. Therefore, I find that the I.G.'s determination to exclude Petitioner Bourseau for 15 years was not unreasonable under the applicable law and regulations.

2. The I.G.'s determination to exclude Petitioner Sabaratnam for a period of 15 years was unreasonable under the Act and applicable regulations. Exclusion of Petitioner Sabaratnam for a period of 10 years is not unreasonable.

The I.G.'s June 14, 2005 notice of proposal to exclude and his Motion for Summary Judgment explained the specific factors that the I.G. considered in making his determination to exclude Sabaratnam for 15 years. The I.G. examined the nature and circumstances of Petitioner's acts and found that these acts resulted in Sabaratnam causing to be submitted cost reports to the Medicare program for Bayview that he knew or should have known included false or fraudulent claims for medical or other items or services. The false or fraudulent claims were submitted on cost reports for Bayview's 1998 Cost Report and 1999 Cost Report totaling $5,219,195 in Medicare funds.

After weighing all of the evidence in this case, and after evaluating the reasonableness of that period in light of the implications of Petitioner Sabaratnum's culpability under the "knew or should have known" standard, I reduce the sanctions imposed against Petitioner Sabaratnam as set out immediately below.

a. The nature and circumstances surrounding the acts that are the basis for excluding Petitioner Sabaratnam.

The evidence pertaining to the acts that form the basis for excluding Petitioner Sabaratnam manifests a high level of untrustworthiness on his part. As Chief Executive Officer (CEO) of Bayview, Petitioner Sabaratnam concurred with the submission of unallowable and fraudulent claims to the Medicare program for substantial sums of money and, as established during the FCA trial, did so over a three year period (1997-1999). The improper expenses billed in Bayview's 1998-1999 cost reports were of several types and included false costs associated with a fictitious lease, hospital space rarely used for patients, management fees for work not done, costs for interest never paid, and costs of services to other providers.

b. Petitioner Sabaratnam's culpability for his conduct.

Although it was Petitioner Bourseau who personally directed the inclusion of the costs at issue which he knew to be unallowable, this does not absolve Petitioner Sabaratnam of substantial culpability in the affair. The evidence establishes that Petitioner Sabaratnam was a willing participant. As to Petitioner Sabaratnam's involvement in the submission of the costs at issue here, Bayview's consultant, Paul Fayollat stated in a February 10, 2005 deposition: " I can't really recall any objections or any arguments between the parties as to the matters." I.G. Ex. 219, at 9. Petitioner Sabaratnam was present at the meeting when the costs were discussed and, as the record evinces, agreed to the inclusion of these false costs in Bayview's Medicare cost reports. Transcript (Tr.) at 871-72, 874, 914-15, 1128; I.G. Ex. 219, at 9.

After a six-day bench trial, the District Court Judge in *United States v. Bourseau, et al.*, No. 03-cv-907-BEN (WMC) ultimately concluded that both Petitioners, Bourseau and Sabaratnam, caused the presentation of the cost reports; that Sabaratnam "agreed with Bourseau's direction to include the costs in CPSM/Bayview Hospitals' cost reports." ALJ Ex. 2, at 17. However, the record of that trial does show that Petitioner Sabaratnam's pattern of conduct was not as aggressive, or as dominant, as that of Petitioner Bourseau. In his deposition, Paul Fayollat stated that Petitioner Sabaratnam may have been present during two meetings at which particular items that were to be included in Bayview's 1998 and 1999 cost reports were discussed. However, according to Mr. Fayollat who himself was present at both those meetings, Sabaratnam never directed him to include any particular item in any Baview cost report for submission to Medicare. I.G. Ex. 219, at 19. Additionally, Fayollot stated that Petitioner Sabaratnam gave him no cost report instructions and that it was Bourseau, and not Sabaratnam, who had knowledge and responsibility regarding Medicare reimbursement at Bayview. Tr. at

425, 501-502. Additionally, Sabaratnam was not copied on any letter prepared by Fayollat's company transmitting Bayview's cost reports to the fiscal intermediary. I.G. Exs. 2, 8, 42. Sabaratnam testified that his knowledge of Medicare regulations pertained to compliance with quality and licensure issues, not cost reporting. Tr. at 923, 929-930.

Petitioner Sabaratnam urges me to believe that there must be some degree of participation in the claims process for liability to attach to him, and that there must be more than mere knowledge of the submission before liability can attach. However, in his role as CEO, Petitioner Sabaratnam had a duty to ensure that Bayview's cost reports reflected accurate reporting of expenditures and were reflective of legitimate client-related costs. Here, he chose to agree with Petitioner Bourseau in the submission of the cost reports which he knew, or certainly should have known, included fraudulent claims.

The I.G. has argued that Petitioner Sabaratnam either deliberately defrauded the Medicare program or was indifferent to program requirements. The distinction between fraudulent and reckless conduct by a provider is irrelevant for purposes of establishing a basis for imposing an exclusion. A provider who presents or causes to be presented claims that are *either* willfully false *or* that are false and are made in reckless disregard for their accuracy has committed conduct that is described under section 1128A of the Act and may be excluded pursuant to section 1128(b)(7) of the regulations.

However, the distinction between deliberately-fraudulent conduct on the one hand and reckless conduct on the other may be significant for purposes of determining the length of an exclusion. A person who engages in deliberate fraud manifests a higher level of culpability than does a person who is reckless. The level of culpability that is involved in a case of deliberate fraud is in many ways comparable to criminal culpability. A person may engage in indifferent or reckless conduct and not be criminally culpable, but yet he may be culpable indeed at some other level.

Congress has recognized that an individual who commits a program related crime is a highly untrustworthy individual and the Act requires that such an individual be excluded. Congress has not found that an individual whose conduct is reckless is necessarily as untrustworthy as a person who has committed criminal fraud against Medicare. There is no identified mandatory minimum exclusion for such an individual under section 1128A of the Act or the applicable regulations at 42 C.F.R. § 1128(b)(7).

Here, the evidence establishes that Petitioner Sabaratnam was indifferent and reckless concerning the cost reports. It may suggest, but does not conclusively establish, that he knowingly, willfully, and intentionally defrauded the Medicare program. That raises the

obvious question of whether Petitioner Sabaratnam's culpability is tantamount to that of an individual who has engaged in intentional criminal fraud. I need not answer that question to find that Petitioner Sabaratnam's culpability is not as great as Petitioner Bourseau's.

I find that Petitioner Sabaratnam's untrustworthiness is reduced somewhat from the I.G.'s estimate by my assessment of his reduced culpability. This is not to suggest that I find Petitioner Sabaratnam to be trustworthy. Far from it: he fully deserves to be excluded from the protected programs because of his demonstrated indifference to the abuse of the programs. Those programs fully deserve to be protected from him. However, I do find that the conduct and attitude of Petitioner Sabaratnam does not manifest the level of culpability and untrustworthiness manifested by the conduct and attitude of Petitioner Bourseau, and on that point I differ with the I.G.'s depiction of it. The preponderance of the evidence shows that Petitioner Sabaratnam did not submit the cost reports to the Medicare program with the specific intent of swindling the government. Rather, the evidence shows that he was recklessly indifferent to program reimbursement requirements, a somewhat lower level of culpability than is associated with intentional fraud. I am reducing the exclusion of Petitioner Sabaratnam from 15 years to 10 years essentially because Petitioner Sabaratnam's culpability for his conduct is less than the I.G. determined it to be.

c. Petitioner Sabaratnam's disciplinary record.

There is no evidence that Petitioner Sabaratnam has a prior record of criminal, civil, or administrative misconduct. In light of that, I conclude that there is nothing in Petitioner Sabaratnam's record which would suggest a higher degree of untrustworthiness than is indicated by the other evidence of record in this case. However, the regulation at 42 C.F.R. §1001.901(b)(3) states that the lack of any prior record is to be considered neutral.

d. Evidence as to other adverse actions that arise from the same circumstances that are the basis for excluding Petitioner Sabaratnam.

The evidence presented here demonstrates that Petitioner Sabaratnam knowingly presented or caused to be presented unallowable costs in Bayview's 1998 and 1999 cost reports, and has been "held liable" for doing so. In this matter, the "other adverse action" is the FCA action in United States District Court.

In the FCA action, United States District Judge Benítez entered his judgment finding that Petitioners Bourseau and Sabaratnam had violated the FCA by causing Bayview to submit false or fraudulent costs to Medicare for payment in Bayview's Medicare cost reports for 1997-1999. That judgment was entered against Petitioners in the amount of $23,776, 332 in treble damages and $31,000 in civil penalties. Judge Benítez found that damages to the Medicare program were $5,219,195, that Petitioners had engaged in a pattern of conduct, and that they acted with a high degree of culpability by engaging in a conspiracy to defraud the Medicare program. *See United States v. Bourseau*, 2006 WL 3949169 (S.D. Cal. Dec. 1, 2006).

e. Other matters as justice may require.

I have noted above the "open-ended" nature of this factor, and that in determining to impose an exclusion, the primary consideration must be the degree to which the exclusion serves the Act's remedial objectives with the excluded party's trustworthiness the touchstone. An exclusion is remedial if it does reasonably serve these objectives: there is a legitimate remedial purpose for exclusions in cases where respondents are untrustworthy providers. And trustworthiness is not an absolute quality: there must surely be a quantitative aspect to it that would allow a period of exclusion to be shaped by the degree of a petitioner's untrustworthiness, as demonstrated by the nature of his wrongdoing in terms of calculation, repetition, flagrance, and damage inflicted, among others.

The Act does not mandate a uniform exclusion of every individual or entity who has engaged in conduct which authorized the Secretary to impose and direct an exclusion under the Act. I have set out above my view of the findings and conclusions upon which the United States District Court judgment was based. Though both Petitioners were held jointly liable for substantial penalties and assessments, I have nevertheless pointed out some differences in their activity. This Petitioner's activity was serious and fraudulent, and in no fashion whatsoever is minimized by anything I now write. But it seems clear that he was a passive – although certainly knowing – wrongdoer when his co-actor was aggressively scheming to abuse the programs. As I have noted above, the federally-funded health care programs and their beneficiaries and recipients need protection from future conduct by Petitioner Bourseau for 15 years. I do not find a remedial need under the Act to exclude Sabaratnam for 15 years. The programs need protection from him, too, but for a lesser period, and I believe that the reasonable and necessary period is 10 years.

VI. Conclusion

For all of the reasons set forth above, and relying on the authority set out in section 1128(b)(7) of the Act, 42 U.S.C. § 1320a-7(b)(7), I sustain the determination of the I.G. to exclude Petitioner Robert I. Bourseau from participation in the Medicare, Medicaid, and all other federal health care programs for a period of 15 years.

For all of the reasons set forth above, and relying on the authority set out in section 1128(b)(7) of the Act, 42 U.S.C. § 1320a-7(b)(7), I sustain the determination of the I.G. to exclude Petitioner Rudra Sabaratnam from participation in the Medicare, Medicaid, and all other federal health care programs, but I reduce the period of Petitioner Sabaratnam's exclusion to a period of 10 years.

/s/
Richard J. Smith
Administrative Law Judge